

12. In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, which was published in the Federal Register on July 1, 1992 (57 Fed.Reg. 29260) and is attached hereto as Exhibit "E", C2+ Technology, a company that altered ESNs, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 57 on page 15 of Exhibit D.

13. The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

Further, we conclude that the practice of altering cellular phone to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.

See paragraph 60 on page 15 of Exhibit D.

14. The Commission further concluded:

Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a customer's knowing use of such altered equipment would violate our rules. We further believe

¹ See previous 47 CFR § 22.915, which became new 47 CFR § 22.933, adopted in the Second ESN Order.

that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

See paragraph 62.² (emphasis added)

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the First ESN Order as codified in Commission rules, and (2) any company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

VI.

REQUEST FOR TEMPORARY RESTRAINING ORDER

15. Pursuant to 47 U.S.C. § 401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, Plaintiffs seek a temporary order from the court asking the court (1) to enjoin Defendants from altering, transferring, emulating or manipulating the ESNs of cellular telephones and (2) that all records, computer disks, and other information concerning altered telephones be preserved in their current state. As shown by the affidavits and evidence attached hereto and incorporated herein, Plaintiffs would show that

² The Second ESN Order also revised § 22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephones to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, as to new telephones, Plaintiffs and other cellular licensees should not be plagued with companies that alter ESNs in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

they will suffer immediate and irreparable injury if an order enjoining defendants from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavits of Nate Doshier and Stephen Barnes, attached as Exhibits "A" and "B", Plaintiffs would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from Defendants indicating the names of customers who have received altered telephones, Plaintiffs do not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner.

16. In addition, 28 U.S.C. § 401(b) states:

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same. (emphasis added)

17. In South Central Bell Telephone Company v. Louisiana Public Service Commission, 744 S. 2d 1107 (5th Cir. 1984) vacated on other grounds 106 S. Ct. 2884, the Fifth Circuit, interpreting §

401(b), stated:

Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience.

Id. at 1114-1115

18. An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable persons. Id. at 1115. On their face, the ESN Orders are "orders" prohibiting individuals, inter alia, from using cellular phones with altered ESNs or from altering ESNs in cellular phones.

19. In order to show that an order was duly served, the Fifth Circuit has stated:

Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in the Federal Register. 5 U.S.C. §522(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public.

Id. at 1119 (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making proceedings under the APA, and the referenced ESN Orders were published in the Federal Register.

20. Plaintiffs, through the affidavits and Exhibits attached hereto and incorporated herein, have shown that the Defendants have

violated "orders" of the FCC which have been "duly served" upon the Defendants. Because Plaintiffs have been injured by Defendants' disobedience, they are entitled to a temporary restraining order prohibiting the altering, transferring, emulating or manipulating of ESNs of cellular telephones and enjoining Defendants from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

VII.

REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

21. By way of this Complaint, Plaintiffs ask the court to set a date, within ten (10) days of the signing of the temporary restraining order, for hearing on the preliminary injunction. At the same time, Plaintiffs ask the court to order Defendants to produce certain records relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and/or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones to the court for in camera inspection and safekeeping.

22. Furthermore, after the preliminary injunction hearing, Plaintiffs ask for a trial at the earliest possible setting in order to permanently enjoin defendants from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, or (2) altering or destroying any record that relates to the altering, transferring, emulating or manipulating of cellular telephones, or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating of cellular telephones.

VIII.
**REQUEST FOR DECLARATORY RELIEF PURSUANT TO
28 U.S.C. 2201 ET SEQ.**

23. Pursuant to 28 U.S.C. 2201(a), Plaintiffs seek a judgment from this court declaring the rights and obligations of Plaintiffs and the Defendants. Specifically, Plaintiffs ask the court to declare:

(1) Defendants' altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.

(2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.

(3) Plaintiffs have the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.

(4) Defendants have no right to alter, transfer, emulate or manipulate cellular telephones of Plaintiffs' customers.

24. Pursuant to 28 U.S.C. 2202 Plaintiffs seek reimbursement of the reasonable and necessary attorneys' fees incurred by Plaintiffs for bringing this declaratory judgment action.

IX.
PRAYER

25. Plaintiffs request this court enter a temporary restraining order, after a hearing, preliminary injunction, and after a trial on the merits, a permanent injunction; that the Court direct the U.S. Marshall to serve the Temporary Restraining Order and seize any and all documents in the possession of the defendant which identify the names, address and other information about individuals or entities whose cellular telephone electronic serial number has been altered, emulated or manipulated by defendant; that they be awarded reasonable and necessary attorneys' fees in connection with the prosecution of this action; and for such other relief, at law or in equity, to which Plaintiffs show themselves justly entitled.

Respectfully submitted,

MISSISSIPPI CELLULAR TELEPHONE
COMPANY

CENTURY CELLUNET OF BILOXI, INC.

BY: 

JOHN GALLOWAY, COUNSEL

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MS Bar No. 4385
Susan Pittman
MS Bar No. 9686
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Certificate under Rule 65 (b)

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, I hereby certify that notice of hearing to Defendants on the Temporary Restraining Order will provide Defendants with the opportunity to alter or destroy records which will disclose the names of Plaintiffs' customers who have had the ESN of their cellular phone altered or emulated. Absent documentation from the Defendants, Plaintiffs have no way to determine what customers are using a cellular phone with an altered or emulated ESN.



John Galloway, Counsel

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SENATE BILL NO. 2763

AN ACT TO PROHIBIT THEFT OF TELEPHONE AND OTHER COMMUNICATION SERVICES; TO PROVIDE DEFINITIONS; TO PROHIBIT THE MANUFACTURE AND POSSESSION OF DEVICES TO FACILITATE SUCH THEFT; TO PROVIDE PENALTIES FOR VIOLATION OF THE ACT; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. (1) The following words and phrases shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) "Telecommunication device" means any type of instrument, device, machine, or equipment that is designed for or capable of transmitting or receiving telephonic, electronic or radio communications, or any part of such instrument, device, machine or equipment, or any computer circuit, computer chip, electronic mechanism or other component which is capable of facilitating the transmission or reception of telephonic, electronic or radio communications;

(b) "Telecommunication service" means any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, radio, electromagnetic, photoelectronic or photo-optical system.

(c) "Telecommunication service provider" means an entity engaged in the creation, display, management, storage, processing, transmission or distribution for compensation of images, text, voice, video or data by wire or by wireless means, or entities engaged in the construction, design, development,

manufacture, maintenance or distribution for compensation of devices, products, software or structures used in the above activities. The term does not include companies organized to do business as commercial broadcast radio stations, television stations or news organizations primarily serving in-state markets.

(d) "Unlawful telecommunication device" means any electronic serial number, mobile identification number, personal identification number or any telecommunication device that is capable or has been altered, modified, programmed or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable of acquiring or facilitating the acquisition of a telecommunication service without the consent of the telecommunication service provider. The term includes without limitation phones altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone phones, tumbler microchips, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider and other instruments capable of disguising their identity or location or of gaining access to a communications system operated by a telecommunication service provider.

(2)(a) It shall be unlawful for any person to use a telecommunication device intending to avoid the payment of any lawful charge for service to the device.

(b) It shall be unlawful for any person to knowingly, willfully and with intent to defraud a person providing telephone or telegraph service to avoid or attempt to avoid or to aid, abet or cause another to avoid the lawful charge in whole or in part for telephone or telegraph service by any of the following means:

(i) By charging the service to an existing telephone number or credit card number without the authority of the subscriber thereto or the lawful holder thereof;

(ii) By charging the service to a nonexistent telephone number or credit card number, or to a number associated with telephone service which is suspended or terminated, or to a revoked, cancelled or expired credit card number, notice of the suspension, termination, revocation or cancellation of the telephone service or credit card having been given to the subscriber thereto or the holder thereof;

(iii) By use of a code, prearranged scheme, or other similar stratagem or device whereby the person, in effect, sends or receives information;

(iv) By rearranging, tampering with, or making connection with telephone or telegraph facilities or equipment, whether physically, electrically, acoustically, inductively, or otherwise, or by using telephone or telegraph service with knowledge or reason to believe that the rearrangement, tampering or connection existed at the time of the use;

(v) By using any other deception, false pretense, trick, scheme, device, conspiracy, or means, including the fraudulent use of false, altered, or stolen identification.

(c) The first offense under this subsection shall be a misdemeanor and shall be punishable by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both. A second or subsequent offense under this subsection shall be a felony and shall be punishable by a fine not to exceed Fifty Thousand Dollars (\$50,000.00) or commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(3)(a) It shall be unlawful for any person to make, possess, sell, give or otherwise transfer to another, or offer or advertise any instrument, apparatus, or device with intent to use it or with knowledge or reason to believe it is intended to be used to avoid any lawful telephone or telegraph toll charge or to conceal the existence or place of origin or destination of any telephone or

telegraph message or to sell, give, or otherwise transfer to another or offer or advertise plans, instructions or any kit for making or assembling such an instrument, apparatus, or device with knowledge or reason to believe that the plans, instructions or kit may be used to make or assemble such an instrument, apparatus, or device.

(b) Any person who possesses a telecommunications device with intent to sell or offer to sell to another, intending to avoid the payment of any lawful charge for service to the device or who makes, distributes, possesses, uses or assembles an unlawful telecommunication device or modifies, alters, programs or reprograms a telecommunications device designed, adapted or which can be used for commission of a theft of telecommunication service or to acquire or facilitate the acquisition of telecommunication service without the consent of the telecommunication service provider or to conceal or to assist another to conceal from any telecommunication service provider or from any lawful authority the existence or place of origin or of destination of any communication is guilty of a misdemeanor and shall be punished by imprisonment not to exceed one (1) year, a fine to not exceed Ten Thousand Dollars (\$10,000.00), or both. Any person who possesses ten (10) or more such unlawful telecommunication devices is guilty of a felony, and shall be punished by a fine not to exceed Fifty Thousand Dollars (\$50,000.00), commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(c) Any person who manufactures ten (10) or more telecommunications devices and intends to sell them to others intending to avoid the payment of any lawful charge for service to the device is guilty of a felony, and shall be punished by a fine not to exceed Fifty Thousand Dollars (\$50,000.00), commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(4) It shall be unlawful for any person to publish the number or code of an existing, canceled, revoked, expired, or nonexistent credit card, or the numbering or coding which is employed in the issuance of credit cards, with the intent that it be used or with knowledge or reason to believe that it will be used to avoid the payment of any lawful telephone or telegraph toll charge. For the purposes of this section, "publishes" means the communication of information to any one or more persons, either orally, in person or by telephone, radio or television, or electronic means, including without limitation a bulletin board system, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper, magazine article, or book.

(5) It shall be unlawful for any person who is the holder of a calling card, credit card, calling code, or any other means or device for the legal use of telecommunications services and who receives anything of value for knowingly allowing another person to use the means or device in order to fraudulently obtain telecommunication services.

(6)(a) A person shall be guilty of theft of telecommunications services if, having control over the disposition of services of others to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto. Theft of telecommunications services when the value of the services obtained or diverted is less than Fifty Dollars (\$50.00) shall be a misdemeanor. Theft of telecommunications services when the value of the services obtained or diverted is Fifty Dollars (\$50.00) or more shall be a felony and shall be punished by a fine not to exceed Ten Thousand Dollars (\$10,000.00), or commitment to the custody of the State Department of Corrections for a period not to exceed ten (10) years, or both.

(b) Amounts involved in theft of services committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the gravity of the offense.

(5) The provisions of this section shall apply to any telecommunication service which either originates or terminates or both originates and terminates in this state or when the charges for service would have been billable, in normal course, by a person or entity providing telecommunication service in this state, but for the fact that the charge or service was avoided, or attempted to be avoided, by one or more means proscribed by this section.

(6) Except as otherwise provided herein, the first offense under this section shall be a misdemeanor and shall be punishable by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both. A second or subsequent offense under this section shall be a felony and shall be punishable by a fine not to exceed Fifty Thousand Dollars (\$50,000.00) or commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

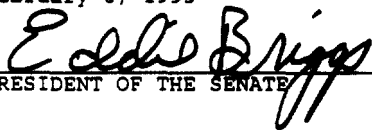
(7) Any person defrauded by any acts prohibited under this section shall be entitled to restitution for the entire amount of the charges avoided from any person or persons convicted under this section. The court may, in addition to any other sentence authorized by law, sentence a person convicted of violating this section to make restitution.

(8) A telecommunication service provider aggrieved by a violation of this section may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, costs of court and attorney fees.

(9) Any instrument, apparatus, device, plans, instructions, kit, or written publication described in subsection (2) or (3) of this section may be seized under warrant or incident to a lawful arrest, and, upon the conviction of a person for a violation of this section, the instrument, apparatus, device, plans, instructions, or written publication may be destroyed as contraband as provided by law.

SECTION 2. This act shall take effect and be in force from and after July 1, 1995.

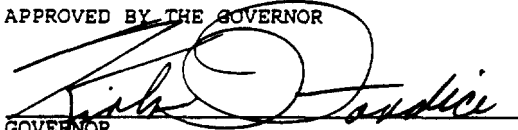
PASSED BY THE SENATE
February 8, 1995


PRESIDENT OF THE SENATE

PASSED BY THE HOUSE OF REPRESENTATIVES
March 1, 1995


SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED BY THE GOVERNOR


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SENATE BILL NO. 2763

Originated in Senate Ernest Russell Secretary

SENATE BILL NO. 2763

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(b) "Telecommunication service" means any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, radio, electromagnetic, photoelectronic or photo-optical system.

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manufacture, maintenance or distribution for compensation of devices, products, software or structures used in the above activities. The term does not include companies organized to do business as commercial broadcast radio stations, television stations or news organizations primarily serving in-state markets.

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(iii) By use of a code, prearranged scheme, or other similar stratagem or device whereby the person, in effect, sends or receives information;

(iv) By rearranging, tampering with, or making connection with telephone or telegraph facilities or equipment, whether physically, electrically, acoustically, inductively, or otherwise, or by using telephone or telegraph service with knowledge or reason to believe that the rearrangement, tampering or connection existed at the time of the use;

(v) By using any other deception, false pretense, trick, scheme, device, conspiracy, or means, including the fraudulent use of false, altered, or stolen identification.

(c) The first offense under this subsection shall be a misdemeanor and shall be punishable by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both. A second or subsequent offense under this subsection shall be a felony and shall be punishable by a fine not to exceed Fifty Thousand Dollars (\$50,000.00) or commitment to the custody of the State Department of Corrections not to exceed ten (10) years, or both.

(3)(a) It shall be unlawful for any person to make, possess, sell, give or otherwise transfer to another, or offer or advertise any instrument, apparatus, or device with intent to use it or with knowledge or reason to believe it is intended to be used to avoid any lawful telephone or telegraph toll charge or to conceal the existence or place of origin or destination of any telephone or

telegraph message or to sell, give, or otherwise transfer to another or offer or advertise plans, instructions or any kit for making or assembling such an instrument, apparatus, or device with knowledge or reason to believe that the plans, instructions or kit may be used to make or assemble such an instrument, apparatus, or device.

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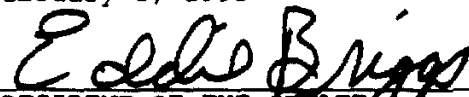
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(9) Any instrument, apparatus, device, plans, instructions, kit, or written publication described in subsection (2) or (3) of this section may be seized under warrant or incident to a lawful arrest, and, upon the conviction of a person for a violation of this section, the instrument, apparatus, device, plans, instructions, or written publication may be destroyed as contraband as provided by law.

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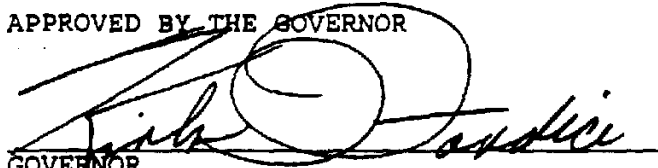
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